

IN THE STATE COURT OF FULTON COUNTY  
STATE OF GEORGIA

JULIE HERLITZ, Individually and as )  
Executor of the Estate of JOJO )  
WILLIAM HERLITZ, deceased, and )  
HANNAH SOFIA HERLITZ and )  
ANDREW WALKER HERLITZ, minors, )  
by next friend and natural guardian, )  
JULIE HERLITZ, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
BATSON-COOK COMPANY, )  
B & M MASONRY, INC. and )  
A & R IRONWORKS, LLC, )  
 )  
Defendants. )

CIVIL ACTION  
FILE NO. 18EV000856

**MOTION TO RECONSIDER AND MODIFY ORDER OF MARCH 12, 2020**  
**GRANTING THE DEFENDANTS' MOTION TO EXCLUDE**  
**THE OPINIONS OF RICHARD ALAN SEALS, JR., Ph. D.**

COME NOW the Plaintiffs in the above-styled action and hereby move the Court to reconsider and modify its Order of March 12, 2020 that excluded the opinions of economist Richard Alan Seals, Ph.D. A copy of the Court's Order is attached hereto as Exhibit "A."<sup>1</sup> In support of this Motion, Plaintiffs show as follows:

Introduction

By definition, intangible damages cannot be precisely quantified. See *Consolidated Freightways Corp. of Delaware v. Futrell*, 201 Ga. App. 233, 410 S.E. 2d 751 (1991). Such damages are to be determined in accordance with the "enlightened conscience of an impartial jury." *Futrell*, *ibid*. The Merriam-Webster Dictionary defines "enlightened" as "based on full

<sup>1</sup> This Motion is timely submitted as all applicable deadlines were stayed, pursuant to Fulton County and Supreme Court of Georgia Judicial Emergency Orders.

comprehension of the problems involved.” Physical and emotional connection (marriage), health, and financial satisfaction are among the prevalent components from which an individual’s enjoyment of life are derived. As will be discussed herein, Dr. Seals can offer statistical evidence and testimony without ascribing the specific valuations generated from the General Social Survey that would enable the jury to appreciate the hierarchy of influence on an individual’s enjoyment of life,

Counsel’s lack of clarity caused the Court to misconstrue Dr. Seals’ opinions as an effort to quantify intangible damages, more specifically, to place a quantitative measure for damages relating to JoJo Herlitz’s loss of enjoyment of life. However, the figures generated by Seals were intended only as a means to gauge the relative impact of various features of life and to provide understanding as to their interplay. Because the General Social Survey data is compiled using monetary ranges, the barometer of each component is its cost compared to other features.

While the methodology employed by Seals, contingent valuation, has a longstanding history of diverse use and acceptance, the Court expressed its concern that it’s reliability for stratifying enjoyment of life had not yet been sufficiently established. This ostensible shortcoming has now been addressed and cured. Dr. Seals has detailed this approach in a submission to the Journal of Legal Economics, which has completed its arduous peer review process and accepted his article and slated its publication for August of 2020. This academic journal is renowned for its discerning critiques of the utility of principles of economics in the legal system. A copy of Dr. Seals’ galley proof is attached to this Motion as Exhibit “B.”

#### What Information Do The Surveys Provide

The General Social Survey is a universally accepted data set that identifies the most impactful components of enjoyment of life, based upon the amounts the respondent is willing to

pay for different features. The data used by Dr. Seals are known in the literature as “happiness surveys.” For all intents and purposes, “happiness” is the equivalent of “enjoyment of life.” This data allows Seals to place a yearly “price” on elements of happiness, alone and in combination. When the “prices” are ordered from most to least expensive, the relative influence of the component(s) is identified and the likely magnitude of enjoyment of life evident.

The General Social Survey includes expansive information that allows Dr. Seals to compare the respective “happiness quotients” for marriage, health and finances. The data relating to the features when present together is the most illuminating and lends credence to the impressions of the decedent’s friends and family. This data reflects that a synergistically increase or decrease in “happiness” occurs, and that excellent and good health and to a lesser degree marriage, overwhelm, mitigate and minimize the influence of financial dissatisfaction.

#### Why Is This Data Relevant?

This case has a unique set of facts. Prior to 2001, the decedent, JoJo Herlitz worked for E3 Corporation, a family owned software business. JoJo’s ownership interest was slightly in excess of eighteen percent (18%). In 2001, the company was sold for Fifty Million Dollars (\$50,000,000.00).<sup>2</sup> JoJo realized approximately Eight Million One Hundred Thousand Dollars (\$8,100,000.00) from the sale, less taxes. (Dep. of Carl Herlitz, p. 14-19.)

Between 2001 and 2008, the Herlitz’ acquired and invested in vacation properties that JoJo managed. The properties and JoJo’s company, Herlitz Property Management, turned a Two Million Dollar (\$2,000,000.00) profit in the seven (7) years prior to 2008. However, when the real estate market cratered in 2008 and continuing through 2017, the Herlitz’ suffered over Six Million Dollars (\$6,000,000.00) of losses. (Dep. of Julie Herlitz, p. 14-18.) At the time of his death, the

---

<sup>2</sup> The last Five Million Dollars (\$5,000,000.00) of the purchase price was never paid.

Herlitz' held ownership interests in one(1) remaining investment property in South Carolina. (Dep. of Julie Herlitz, p. 15.)

JoJo's priorities changed after 2008 and he adopted a modest, family-centric mentality. He brought his wife coffee every morning, cooked dinner most nights and attended all of his kids' activities and school events. He worked a variety of part-time jobs so as to maximize his family time. While his earnings from these jobs was only roughly Twenty-Five Thousand Dollars (\$25,000.00) a year, JoJo viewed the benefits of availability as outweighing a higher income.<sup>3</sup>

The Defendants are expected to argue that JoJo's financial decline precludes true enjoyment of life and the average jury is unlikely to have experienced the effects of losing millions of dollars. However, without exception, the testimony is expected to reflect that JoJo was content with his lifestyle and that he continued to enthusiastically find pleasure and enjoyment in his relationships, interactions and activities, despite the change in his economic circumstances. (See, for example, Dep. of John McKinley; Dep. of Richard Owings.) The evidence will reflect that JoJo became absorbed and was fully committed to being a devoted husband and ever-present dad. There will also be evidence that JoJo had no significant health problems and, at most, a moderate amount of financial dissatisfaction.

#### What Does the Data Show

Dr. Seals' information provides objective, statistical evidence that being married and in excellent health overrides financial dissatisfaction. The data reflects a three times higher valuation of enjoyment of life for individuals in "excellent" health, as opposed to "fair" health. "Excellent" health generates a one and a half times higher valuation of enjoyment of life when compared to "good" health. Whether an individual in excellent health is married or unmarried influences

---

<sup>3</sup> Julie Herlitz earned approximately Thirty-Five Thousand Dollars (\$35,000.00) a year as a realtor. JoJo's parents helped by paying daughter Hannah's college expenses that were not covered by the Hope Scholarship.

happiness valuation by approximately two times. In comparison, the difference between financially satisfied and dissatisfied individuals is one and a half times. When viewed cumulatively, married people in excellent health who are moderately financially dissatisfied generate happiness valuations three and a half times higher than unmarried individuals in “good” health, who are similarly displeased with their financial situation. Married people in excellent health with moderate financial dissatisfaction generate approximately two and a half times the happiness valuations of analogous individuals in fair health.

Relevant evidence is any evidence which relates to the questions being tried by the jury and bears upon them either directly or indirectly. O.C.G.A. § 24-2-1. Once relevancy is established, the evidence should be admitted so long as it does not offend some other rule of evidence. Furthermore, a principle firmly entrenched in our jurisprudence regarding the admissibility of evidence is that when evidence offered by a party is of doubtful relevancy, it should nevertheless be admitted, *and its weight left to the jury*. *Continental Trust Co. v. Bank of Harrison*, 36 Ga. App. 149 (1926); *Burton v. Campbell Coal Co.*, 95 Ga. App. 388 (1957); *Calhoun v. Branan*, 149 Ga. App. 160 (1979); *Owens v. State*, 248 Ga. 586 (1981).

#### The Data Has Been Reliably Applied

Now that Dr. Seals’ application of the General Social Survey data and contingent valuation methodology have been favorably peer reviewed, the requisite showing that the testimony is the product of reliable principles and methods properly applied has been made.

The Defendants contention that valuation disparities from model to model reflect a flaw in the methodology or its application is incorrect. The models produce different valuations because they are dissimilar and do not price the same combinations and amounts of components. The dollar

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.